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No. 91-153

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

STATE OF MARYLAND,

Petitioner,

v.

LENARD BERNARD OWENS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Maryland

REPLY BRIEF

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REPLY ARGUMENT

THE SECOND QUESTION PRESENTED IN THE PETITION IS PROPERLY BEFORE THE COURT.

Respondent Owens contends in his Brief in Opposition to Petition for Writ of Certiorari that the second question presented in the State of Maryland's

petition is not properly before this Court. Specifically, Owens contends that (1) the issue was not raised or decided in the suppression court or in the intermediate appellate court; and (2) the issue was not decided by the Court of Appeals of Maryland, the state's highest court. Neither claim supports Owens's argument, as the first is of no legal significance and the second is belied by the Court of Appeals' opinion itself.

Whether or not the probable cause issue was pressed in the trial court or in the intermediate appellate court is irrelevant to the question whether the issue is properly before this Court. The only question of consequence is whether the state's highest court has ruled on the federal question. Indeed, this Court has expressly held that where the highest state court assumes or holds that a federal

question is properly before it and then proceeds to consider and dispose of that issue, any concern as to whether or when the question was raised in the state courts evaporates. Hildwin v. Florida, 490 U.S. 638, 639 n.* (1989) (per curiam); Payton v. New York, 445 U.S. 573, 582 n.19 (1980); Franks v. Delaware, 438 U.S. 154, 161-62 (1978). In this case, the issue presented by the second question in the petition not only was raised in, but was decided by, Maryland's highest court.

As Owens concedes at page 4 of his Brief in Opposition, the State specifically raised the issue in its brief before the Court of Appeals. And, notably, neither Owens nor the Court of Appeals challenged the timeliness of the presentation of the probable cause issue. See Orr v. Orr, 440 U.S. 268, 274 (1979). The State argued that because the record reflected that the

officers had probable cause to search Owens's bag, it was reasonable to open the unlocked bag rather than wait to obtain a search warrant. (Brief of Respondent in Court of Appeals of Maryland at 13). The State noted that although United States v. Chadwick[1] and Arkansas v. Sanders[2] appeared to hold that it was necessary to secure a warrant before searching a container, this Court's decision in California v. Acevedo[3] was then pending, and the Court's earlier decisions were being reexamined. (Brief of Respondent in Court of Appeals of Maryland at 14).[4]

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[1] 433 U.S. 1 (1977).

[2] 442 U.S. 753 (1979).

[3] 111 S. Ct. 1982 (1991).

[4] Owens suggests that the State did not press this argument at the suppression hearing because it did not believe at that time that probable cause existed to search Owens's bag. (Brief in Opposition at 4 Cont'd

In response to the argument raised by the State, the Court of Appeals discussed Chadwick and Sanders at length, noting that those cases required both a reasonable search and a search warrant. (Pet. for Cert. at 21a-26a, 31a-36a). After discussing some of the exceptions to the warrant requirement, the court said:

> Even though the police may have had ample probable cause to believe that the luggage contained contraband, as was also the case in Sanders, "[w]ith the [bag] safely immobilized, it was unreasonable to undertake the additional and greater

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n.1). The far more likely reason for the State's omission at that juncture is that Acevedo was not then pending and that, under prevailing law, a warrant was required to conduct the search. In fact, the evidence adduced at the suppression hearing established overwhelming probable cause. The police officers had information that four men had left drugs at Gardin's apartment earlier that day. (E. 23). Gardin not only corroborated that information, but added that Owens had brought drugs into her apartment on prior occasions. (E. 13, 16-20, 25, 28).

> intrusion of a search without a warrant." Chadwick, 433 U.S. at 13, 97 S.Ct. at 2485. Of course, it was more convenient for the officers to search the bag then and there, but convenience is not the criterion by which the Fourth Amendment is tested.
>
> > The judicial warrant has a significant role to play in that it provides the detached scrutiny of a neutral [judicial officer], which is a more reliable safeguard against improper searches than the hurried judgment of a law enforcement officer "engaged in the often competitive enterprise of ferreting out crime."
>
> Id. at 9, 97 S.Ct. at 2482, quoting Johnson v. United States, 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948).

(Pet. for Cert. at 31a-32a).

If in the above-quoted portion of its opinion the Court of Appeals was not reaching the probable cause issue raised by the State, then there would have been no need for the court either to rely upon the

Sanders or Chadwick rule or to make reference to the fact that the police had no warrant. The court simply could have ruled that because the consent was invalid, the search and seizure of the bag was likewise invalid. Or, the court could have ruled as a preliminary matter that probable cause was lacking.

That the Court of Appeals considered an issue not previously raised in the suppression court or the intermediate appellate court is not unusual. In Maryland, a trial court ruling may be upheld on appeal for a reason other than that relied upon below, so long as the record supports it. See Henry v. State, No. 41, Sept. Term, 1990, slip op. at 34 (Md. Ct. App. Oct. 11, 1991), citing Robeson v. State, 285 Md. 498, 502, 403 A.2d 1221, 1223 (1979), cert. denied, 444 U.S. 1021 (1980). It is likewise the rule,

as the Court of Appeals itself declared in this case (Pet. for Cert. at 19a), that an appellate court makes an independent constitutional appraisal in search and seizure cases. See Riddick v. State, 319 Md. 180, 183, 571 A.2d 1239, 1240 (1990). Consequently, in deciding the Chadwick issue, the Court of Appeals need not have been, and was not, deterred by the absence of a lower court ruling as to whether the police had probable cause to search Owens's bag. This Court has jurisdiction to decide the issue by application of "the elementary rule that it is irrelevant to inquire how and when a Federal question was raised in a court below when it appears that such question was actually considered and decided." Manhattan Life Ins. Co. v. Cohen, 234 U.S. 123, 134 (1914).

CONCLUSION

Owens concedes that the first question presented by the Petition for Writ Certiorari is properly before the Court. (Brief in Opposition at 4). For the foregoing reasons, the second question presented is likewise properly before the Court.

Respectfully submitted,

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